No. 12023

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.
HONOLULU PLANTATION COMPANY,
Appellee,
and
HONOLULU PLANTATION COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR HONOLULU PLANTATION COMPANY, APPELLANT

On Appeal from the United States District Court For The District of Hawaii

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OPINION BELOW

The opinion of the district court (R. 461-504) is reported at 72 F. Supp. 903.

STATEMENT OF THE PLEADINGS AND THE FACTS

This is a cross-appeal by the Honolulu Plantation Company, defendant in the consolidated thirteen condemnation cases in the Court below, from that portion of the final judgment of the District Court of the United States for the District of Hawaii entered on November 5, 1947, which disallows just compensation for severance damages suffered by said Honolulu Plantation Company through the taking of its interest in 595.01 acres of cane land covered by those certain agreements executed by and between

the trustees of the Damon Estate and said Company. The judgment was entered pursuant to the decision of the Court made and entered on August 22, 1947. (R. p. 504.)

This consolidated proceeding originally involved thirteen (13) separate proceedings against several defendants, including the Honolulu Plantation Company, which latter Company was named as defendant in each and all of the thirteen proceedings. The jurisdiction of the district court was invoked under section 201 of the Act of March 27, 1942, 56 Stat. 176, 177, 50 U.S.C. sec. 171 (a).

An order and judgment of taking was entered by the Court in each of the thirteen proceedings. (R. Index P.IV.)

A motion for consolidation of seven of the thirteen cases, to wit: Civil Cases Nos. 514, 525, 529, 533, 535, 544 and 548, together with an affidavit for consolidation of actions was filed by the Honolulu Plantation Company on February 17, 1945 (R. p. 427); and on the same date, pursuant to a stipulation between counsel for the United States of America and the Honolulu Plantation Company, an order of the Court was entered consolidating the said six proceedings into one proceeding. (R. p. 433.)

A motion for consolidation of six of the proceedings, to wit: Civil Cases Nos. 521, 527, 532, 536, 540 and 684 and the proceedings consolidated by order of the Court dated February 17, 1945, together with an affidavit for consolidation of actions was filed by the Honolulu Plantation Company on October 9, 1946. (R. p. 441.) After a hearing on the motion on November 14, 1946, the Court granted said motion and an order consolidating all thirteen proceedings into one proceeding, insofar as the Honolulu Plantation Company was concerned, was entered by the Court on November 22, 1946. (R. p. 459.) The order provided further that the trial be had in the same manner as if all of said takings had been in one proceeding. On the trial of the consolidated proceedings, the date of the first taking, June 21, 1944, was adopted by the Honolulu

Plantation Company as the date of taking in all thirteen condemnation cases. No formal objection to said date was raised by counsel for the Government and, as a result, June 21, 1944, is to be considered the date of all of the takings herein.

Defendant, Honolulu Plantation Company, answered (R. 31, 64, 83, 106, 319, 350, 423) alleging, among other things, that at the time of the filing of the several petitions for condemnation and for many years prior thereto, the Honolulu Plantation Company had occupied and cultivated the lands taken in each of the thirteen proceedings as integral parts of a sugar plantation operated and conducted by it at Aiea adjacent to Pearl Harbor, and in connection with other large and contiguous tracts situated outside the lands described in each petition but comprised within the said Plantation and demised to said Honolulu Plantation Company by a number of leases. Defendant alleged further that by the taking of the said lands described in each of said petitions, the integrity of said sugar Plantation was destroyed and the unitary value of the leasehold interests and estates of the Company in other contiguous tracts of lands was greatly impaired and diminished; that the value of the physical properties remaining after the takings was greatly depreciated due solely to the severance of the lands involved in these takings from the properties operated as a unit by the Company as a sugar plantation. Wherefore, said defendant prayed that the damages suffered by reason of the taking of said lands and properties be determined and the amount awarded and paid to said Honolulu Plantation Company.

A jury-waived trial was held from December 2, 1946, to January 15, 1947, inclusive, except for recesses for the holidays and for other reasons.

The Court awarded damages upon the following basis:

1. For the lands and improvements owned in fee by the Honolulu Plantation Company—$38,988.00.

2. For a concrete supply ditch constructed upon land leased from (1) Bishop Estate and (2) the Oahu Railway & Land Co.—$15,585.00.

3. Severance damages—$440,175.00—said damages being measured upon the basis of 440.175 acres only, the Court finding that the Honolulu Plantation Company did not have such an estate or interest in the 595.01 acres of land held under the Damon lease as to entitle it to compensation in these proceedings. (R. p. 503 et seq.)

On February 3, 1948, within the time prescribed by law, the United States of America, petitioner in the Court below, duly filed a notice of appeal to this Court (R. p. 508) and on the same date the Honolulu Plantation Company duly filed a notice of cross-appeal to this Court (R. p. 509). Said appeal and said cross-appeal have been perfected to this Court.

The jurisdiction of this Court is invoked under the provisions of Section 128 of the Judicial Code, as amended, now 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

From about the year 1899, the Honolulu Plantation Company, a California corporation, operated continuously a sugar plantation on the Island of Oahu, Territory of Hawaii, at Aiea, adjacent to Pearl Harbor. The principal operations of the enterprise were the growing of sugar cane and the processing of sugar therefrom. Because it leased all but a very small portion of the lands used in its operations, it was known in Hawaii as a leasehold plantation. Upon the lands so held, which were contiguous, it had constructed a sugar mill, a railroad system, a system of roads, camps for its employees, wells, pumps, irrigation systems, and other properties which formed a part of the sugar plantation enterprise. The sugar mill and related facilities and the principal camps for employees were located on lands owned in fee by the Company, which lands were

situated almost in the center of the integrated plantation. All of these structures, fixtures, appurtenances, and improvements were necessary to the maintenance and operation of a plantation for the growing of sugar cane and the processing of the cane into sugar. All of these properties were part of a single integrated property and were operated as a unit devoted as a whole to the raising of cane and the processing of that cane into sugar. The mill, railroads, roads, camps, wells, pumps, irrigation systems and other properties of the Company were constructed and built to operate a 36,000-ton plantation.

About the year 1939, the United States began to take properties of the Honolulu Plantation Company for military and naval purposes. These properties were taken piecemeal, but up to the beginning of World War II had resulted in bringing the plantation down to about a 21,000-ton plantation. As a result of the needs and demands of the Army and Navy caused by World War II, the Government in these present proceedings acquired some 1,364.35 acres, more or less, formerly held under lease or in fee by the cross-appellant of which 1,087.59 acres were sugar cane land devoted to the purpose of raising sugar cane. As a result of these takings, the cane acreage of the Company was reduced from about 4,397.34 acres to approximately 3,309.75 acres, and it was reduced from a 21,000-ton to about a 15,000-ton sugar plantation.

As a result of the takings in these proceedings, the physical properties of the Honolulu Plantation Company remaining after the takings were greatly depreciated in value due solely to the severance of the lands involved in these takings from the properties operated as a unit by the Company as a sugar plantation. The market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conducted by cross-appellant was far higher than the market value or the fair value of the real property of said inte-

grated unit remaining after the takings. The difference between those values is the amount the Company suffered in damages by reason of the severance.

The District Court in its decision awarded severance damages to the Honolulu Plantation Company upon the basis of $1,000 per acre for 440.175 acres, or a total of $440,175. The Court did not award severance damages in connection with the 595.01 acres of land held under the Damon title on the theory that the Company did not have an estate or interest in those lands which would entitle it to compensation in these proceedings.

The principal question presented on this cross-appeal is whether or not cross-appellant possessed such a property interest in the Damon lands as to entitle it to just compensation by way of severance damages under the Constitution of the United States.

SPECIFICATIONS OF ERROR

1. The District Court erred in finding that appellant Honolulu Plantation Company did not have such a property interest in the land held by it under the Damon title as to entitle it to just compensation by way of severance damages under the 5th Amendment of the Constitution of the United States.

2. The District Court erred in not finding that appellant Honolulu Plantation Company was entitled to just compensation for severance damages suffered by said Company through the taking of said Company's property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said Company.

3. The District Court erred in not awarding appellant Honolulu Plantation Company the amount of $595,010 as just compensation for severance damages suffered by said Company through the taking of said Company's property interest in 595.01 acres of cane land held by it under those

certain agreements executed by and between the Trustees of the Damon Estate and said Company.

4. The District Court erred in not awarding said Company the amount of $1,035,185 as severance damages.

QUESTIONS INVOLVED

1. Does the Honolulu Plantation Company have such a property interest in the land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said Company as to entitle the latter to just compensation by way of severance damages under the Fifth Amendment of the Constitution of the United States?

2. Is the Honolulu Plantation Company entitled to just compensation in the amount of $595,010 for severance damages suffered by it through the taking of its property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said Company?

SUMMARY OF ARGUMENT

1. Where real property is condemned by the sovereign, a person other than the owner of the fee is entitled to compensation if he possesses an "interest" or "estate" in the land. By virtue of those certain agreements executed by and between the Honolulu Plantation Company and the Trustees of the Damon Estate, the Honolulu Plantation Company held a lease, or in the alternative, an agreement to lease in connection with the Damon lands and thus owned such a property interest in said lands as to entitle it to just compensation.

2. Where a part of a tract of land is taken for public use, the just compensation to which the owner of an interest therein is entitled includes the damages to the remainder of the tract resulting from the taking, in addition to the value of the land taken. As a result of the takings in these proceedings, the physical properties of the Honolulu Plantation

Company remaining after the takings were depreciated in value because of the severance of the lands taken from the properties operated as a unit by the Plantation. The difference between the market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conducted by the Company and the market value of the same property remaining after the takings is the amount the Company suffered in damages by reason of the severance.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN FINDING THAT THE HONOLULU PLANTATION COMPANY DID NOT HAVE SUCH A PROPERTY INTEREST IN THE LAND HELD BY IT UNDER THE DAMON TITLE AS TO ENTITLE IT TO JUST COMPENSATION BY WAY OF SEVERANCE DAMAGES UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES. (Statement of Points on which Cross-Appellant intends to rely on Cross-Appeal, Point (1) Record p. 516.)

Under the date of June 27, 1927, a written indenture of lease was entered into by and between the Trustees of the Damon Estate and Honolulu Plantation Company (Ex. 9K, R. p. 1513). The term of said lease was for a period of fifteen years from January 1, 1929, and consequently said term expired on December 31, 1943. By a letter dated October 18, 1940, more than three years prior to the expiration of the lease referred to above, the Trustees of the Damon Estate offered to lease certain areas of land, therein more particularly set forth, to the Honolulu Plantation Company upon certain conditions for a term of ten years from the expiration of the then current lease (Ex. 9K, R. p. 1513). This communication, it is to be noted, recites in detail the proposed agreement between the parties. The letter clearly states an offer by the Trustees of the Damon

Estate to presently demise the property upon terms therein set forth which are both comprehensive and definite.

By a letter dated October 21, 1940 (Ex. 9K, R. p. 1513), C. Brewer & Company, acting as agent for the Honolulu Plantation Company, accepted the offer contained in the communication from the Trustees of the Damon Estate. It is the position of the Honolulu Plantation Company that the above mentioned letters of offer and acceptance constitute a contract. Whether or not such a contract be considered as a lease or agreement to lease is immaterial insofar as the rights of the Honolulu Plantation Company to recover in these consolidated proceedings is concerned. To assist the Court in determining whether this contract is a lease or an agreement to lease, we shall endeavor to present the argument in favor of the contract constituting a lease and, in the alternative, in favor of the contract constituting an agreement to lease. It is contended that whichever view is taken by the Court, the Honolulu Plantation Company is entitled to recover just compensation for the interest held by it under the so-called Damon title, which interest was taken by the United States in these proceedings.

1. BY VIRTUE OF CERTAIN CORRESPONDENCE BETWEEN THE HONOLULU PLANTATION COMPANY AND THE TRUSTEES OF THE DAMON ESTATE, THE COMPANY HELD A LEASE ON THE SO-CALLED DAMON LANDS.

There is, of course, a real distinction between a lease and an agreement to lease insofar as the rights and liabilities of the parties are concerned.

In *Thompson on Real Property* (1940, Vol. 3, p. 293, Section 1214), it is said:

> "Although the line separating present leases from agreements for a future demise is often difficult to distinguish, there is a marked difference in the rights of the parties under the two contracts. By a lease the lessee acquires an estate in the land, by an agreement for a lease he merely acquires an executory right to have the owner convey him an estate for breach of

> which he has a claim for damages or a possible right to specific performance in equity. It constitutes an ambiguity for which a complaint will be bad on demurrer to allege an agreement for a lease and to state contracts which constitute an actual lease. Whether an instrument is a lease or an agreement to lease, the owner has a cause of action if the other party refuses without just cause to perform his agreement."

There is no reason to believe that the law of Hawaii is not in accord with this general statement. The difficult question arises, however, in determining whether a contract in a given case constitutes a lease or an agreement to lease. The answer to such an inquiry depends upon the intent of the parties as manifested by the contract between them.

In *Thompson on Real Property* (1940, Vol. 3, p. 293, Section 1215), the author says:

> "The intention of the parties as manifested by the language of the instrument is the controlling element in determining whether it is a lease or a mere executory agreement. The test of intention in regard to making a lease or an agreement to lease is whether the agreement leaves anything incomplete. If it does not, it may operate as a present demise. The law seems to be settled that when an agreement leaves nothing to be done and gives the lessee an immediate right to possession, it is a lease, passing a present estate in the land. If the words used imply an immediate demise, with no stipulation for a further lease, the term, rent, and manner of occupation being all explicitly stated, it confers all the rights of a lessee upon the contracting party. In every case where an agreement has been held not to operate by passing an interest but to rest in contract, there has been either an express agreement for a further lease, or construing the agreement to be a lease in praesenti would work a forfeiture, or the terms have not been fully settled, or something further was to be done. . . . However, where there were apt words of present demise, and the tenant went into

possession and occupied thereunder, such instrument has been construed as a present demise rather than as an agreement for a lease, notwithstanding it contained a covenant for the execution of a more perfect and formal lease."

An examination of the correspondence between the parties (Ex. 9K, R. p. 1513) indicates strongly that the parties intended a present demise which was to become effective upon the termination of the then existing lease. The letters of October 18, 1940, and October 21, 1940, form the basis of an agreement which identifies and describes the property to be leased with sufficient definiteness. The term is designated and the rental is specified. All of the elements necessary to the validity of a lease are present in the agreement. It has been held that where a lessee has entered into possession and occupied premises under an instrument which is ambiguous, the Courts will consider the acquiescence of the lessor and give effect to the instrument as a present demise. *Jackson Ex. Dem. Livingston v. Kisselbrack,* 10 Johns. (N.Y.) 336, 6 Am. Dec. 341. It has also been held that such an entry and occupation is strong evidence that the parties intended a present demise. *Hallett v. Wylie,* 3 Johns. (N.Y.) 44, 3 Am. Dec. 457. The Honolulu Plantation Company continued in possession of the premises after the expiration of the 1927 lease, paying the rentals set forth in the letter agreement and complying in all other respects with the new agreement as set forth in the correspondence indicated above.

Mr. P. E. Spalding, attorney-in-fact for Honolulu Plantation Company and president of C. Brewer & Company, who was instrumental in the negotiation of the new lease, testified that he believed that the Honolulu Plantation Company had a lease on the Damon lands in question by virtue of the exchange of letters referred to above. (R. p. 1113, et seq.)

The only real question presented is in connection with the statements contained in the letters in Exhibit 9K with respect to the execution of a formal lease at a future time. It may be true that the fact that the parties contemplate the execution of a formal lease in the future may show that the agreement is a contract for a lease rather than a lease itself. But it is submitted to the Court that this is not necessarily so, especially, as in this case, where the facts indicate that the parties intend that the agreement shall operate as a lease.

In the case of *Wong Kwai v. Dominis,* 13 Haw. 471, the question presented to the Court was whether a certain lease was an offer to lease the land and, if so, whether the offer was accepted and the legal effect of such acceptance. The letter containing the offer of lease included a statement that, if the offer were accepted, the offeror would immediately draw up a formal document at a future date.

The Court, in affirming the decree of the lower court granting the specific performance of the agreement, said as follows:

> "The fact that a formal lease was contemplated did not prevent the letter and the acceptance of its terms from constituting a final binding contract, the preparing and signing of the lease being merely in execution of the contract. . . ."

At the time of the takings involved herein, the Honolulu Plantation Company was in possession of the premises under what it considered to be a valid lease. The Company was paying a different and higher rent than was provided for in the 1927 lease. (R. p. 1202.) All of the other covenants in the new agreement were being carried out in accordance with the understanding between the parties. Substantial expenditures were made on the Damon lands in reliance on the validity of the lease. (R. p. 1202.) In view of these facts, it is submitted that it was the intention of

the parties that the agreement was to constitute a lease of the premises.

The District Court allowed severance damages on 440.175 acres of land on the theory that the Company had a substantial leasehold estate in said lands. (R. p. 496.) The Court expressly dismissed from consideration the 595.01 acres of land held under the so-called "Damon Lease" because the Court found that on June 21, 1944, the date of the takings, the Honolulu Plantation Company did not have such an interest in the lands held under the Damon title as to entitle it to severance damages. (R. p. 503.) If the contract constituted a lease of the Damon lands, it seems clear that the Honolulu Plantation Company would be entitled to compensation for the 595.01 acres here involved on the same basis as the award made by the Court for severance damages in connection with the taking of the 440.175 acres of land; i.e., at the rate of $1000 per acre.

The Court is referred to Paragraphs II and III of this brief for the argument of the general theory on which the Company's case for severance damages for all of the leasehold lands is based.

2. IN THE ALTERNATIVE, BY VIRTUE OF CERTAIN CORRESPONDENCE BETWEEN THE HONOLULU PLANTATION COMPANY AND THE TRUSTEES OF THE DAMON ESTATE, THE COMPANY HELD AN AGREEMENT TO LEASE ON THE SO-CALLED DAMON LANDS.

It is submitted to the Court that even if it be assumed that the letters of October 18, 1940, and October 21, 1940 (Exhibit 9K, R. p. 1513), constitute a contract to lease rather than a lease itself, the Honolulu Plantation Company is entitled to recover just compensation for severance damages suffered by the Company by virtue of the taking of its property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and the Honolulu Plantation Company.

As a general rule, where property is condemned by the sovereign for a public use, a person other than the owner of the fee is not entitled to compensation unless he possesses an "interest" or "estate" in the land as distinguished from a purely contractual right. If a claimant is the holder of a life estate, a term for year or other recognized interest in land taken in the eminent domain proceedings, there is, of course, no question concerning his right to share in the award. The real problem arises where the interest in land does not come within any of the usual and customary classifications of interests or estates in land and more specifically where the particular interest is less than an estate for years.

It is the contention of the appellant herein that by virtue of the contract to lease with respect to the Damon Tract, it possessed an interest or estate in land which had a direct and concrete connection with the land condemned and that it is entitled to compensation for the taking of such interest. So far as we have been able to determine, the question as to whether a contract to lease confers an interest or right sufficiently related to land to entitle the owner thereof to compensation has never been presented to a court for adjudication. It is believed, however, that when the suggested theory is examined in the light of recent decisions of the Circuit Courts of Appeal and the U. S. Supreme Court, the Court will conclude that, under the circumstances of the present case, the possessor of such a right is entitled to compensation.

The basic principle underlying the law of eminent domain is best illustrated by the words set forth in the Fifth Amendment to the United States Constitution: "... nor shall private property be taken for public use, without just compensation."

In commenting upon the use of the word "property," Professor Hohfeld remarks as follows:

> "Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again — with far greater discrimination and accuracy — the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a 'blended' sense as to convey no definite meaning whatever."[1]

It seems evident that the writer is suggesting the use of two entirely different concepts, one physical, involving the conception of property as a physical object, and the other a mental concept, concerned with the legal relations of persons in exercising control over physical objects. The history of eminent domain law in the United States illustrates very clearly the transition from a purely physical conception of property to the conception of property as a word expressing every species of right and interest which may be enjoyed by a person in connection with property and upon which it is possible to put a money value.

To show the changing concepts regarding eminent domain law held by the courts over a period of years, we shall refer briefly to a number of cases.

Illustrative of the purely physical concept of the eminent domain process is the following excerpt from the case of *Monongahela Navigation Co. v. Coons,* 6 Watts & S., 101 (Pa. 1843):

> "Now, it cannot be said that the plaintiff's mill was taken or applied, in any legitimate sense, by the State, or by the company invested with its power; nor can it be said he was deprived of it. . . . It is true, that a nuisance by flooding a man's land was originally considered so far a species of ouster, that he might have

[1] Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and other legal essays. (1923) p. 28.

had remedy for it by assize of novel disseisin, or assize of nuisance, at his election; but we are not to suppose that the framers of the Constitution meant to entangle their meaning in the mazes of the *jus antiquum*. It was aptly said by Chief Justice Tilghman, in The Farmers' and Mechanics' Bank v. Smith (3 Serg. & Rawle 69), that conventions to regulate the conduct of nations are not to be interpreted like articles of agreement at the common law; and that where multitudes are to be affected by the construction of an instrument, great regard should be paid to the spirit and intention. And the reason for it is an obvious one. A constitution is made, not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is consequently expressed in the terms that are most familiar to them. Words, therefore, which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious, and natural meaning; and, applying this rule to the context of the Constitution, we have no difficulty in saying that the State is not bound beyond her will to pay for property which she has not taken to herself for the public use."[2]

In another early decision in which the court denied compensation where the claimant sought damages for the loss suffered by the construction of a railroad adjacent to his land, the court remarked:

"The prohibition of the constitution is against taking private property without compensation, and not against injuries to such property, where it is not taken. In this case, the private property of the plaintiffs is not taken by the defendants; but the whole allegation is, that it is injured by erections in its vicinity; and the plaintiffs have not, therefore, any claim to have their damages ascertained and paid for before such erections shall be constructed or used."[3]

[2] To be distinguished from the case of Monongahela Nav. Co. v. U. S., 148 U.S. 312, 37 L. Ed. 463.

[3] Drake v. Hudson River R. Co., 7 Barb. 508, 559 (N.Y.) 1849.

The gradual abandonment of the physical concept is well illustrated by the case of *Thompson v. Androscoggin Co.*, 54 N.H. 545 (1874), in which the court said:

> "Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors. . . . Property is taken, when any one of those proprietary rights is taken, of which property consists."

In recent years the problem of the proper concept to be adopted by the courts has been raised in connection with eminent domain proceedings involving the question as to what parties possessed property interests entitling them to compensation. It seems clear that the basic question involved in such cases is whether or not the claimant possesses an "interest" or "estate" in land sufficient to entitle him to compensation.

In the case of *U. S. v. 53¼ Acres of Land,* 139 F. 2nd, 244 (1943) the Government took title to certain lands by condemnation proceedings. The mortgagee of the leasehold possessed a right of redemption under a statute permitting redemption after the termination of a lease. It was contended that with title vested in the United States, the mortgagee was not the owner of any estate or interest in or lien upon the premises, having only a statutory right to redeem on a certain date. It was argued that it was merely privileged to enter into a contractual relationship as a tenant of the city and was not the owner of a compensable property right. In answer to this contention, the court remarked as follows:

> "... We see no reason to grope about in the mysterious world of 'estates' and 'interests not estates.' The law of New York has put the matter on a very prac-

tical basis: a right with respect to property taken in condemnation may be so remote or incapable of valuation that it will be disregarded in awarding compensation; otherwise it will not be disregarded . . ."

In *Brooklyn Eastern District Terminal v. New York,* 139 F. 2nd 1007 (1944), the question presented to the court was whether the Brooklyn Terminal possessed an interest in land by virtue of a contract it had with the City of New York for purposes of providing a freight terminal for the City's market as to entitle it to share in the award made to the City upon the condemnation of the market by the Government. Under the terms of the agreement between the parties, the Terminal was to operate the freight terminal at the market for a period of ten years with a right of renewal for an additional ten years and at the termination of the agreement, the facilities were to become the property of the City.

In the words of the court:

> ". . . It is clear that unless petitioner's rights and privileges here amount to an estate or interest in the lands within the statutory meaning it is not entitled to share in the award, whatever possible claims it might conceivably have in some other forum on the basis of a frustrated contract or otherwise. Cf. New York Telephone Co. v. United States, 2 Cir, 136 F. (2d) 87; Omnia Commercial Co. v. United States, 261 US 502, 43 S Ct 437, 67 L ed 773. If, therefore, the district court is correct that petitioner had only a contract with respondent making it respondent's agent to supply freight facilities to the Market, then the denial to it of a share in the award was correct . . ."

The court, citing with approval the case of United States v. 53¼ Acres of Land, supra, held that the above mentioned contract was sufficient to create a substantial interest in the land entitling the claimant to share in the award made to the owner upon the condemnation of the land by the United States.

In *United States v. General Motors Corporation,* 323 U.S. 373, 89 L. Ed. 311, the court said:

> "The critical terms are 'property,' 'taken' and 'just compensation.' It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years,' as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.
>
> "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

In the case of *Monongahela Navigation Co. v. United States,* 148, U.S. 312, 37 L. Ed. 463, the court said:

> ". . . Our conclusions are, that the Navigation Company rightfully placed this lock and dam in the Monongahela river; that, with the ownership of the tangible

property, legally held in that place, it has a vested franchise to receive tolls for its use; *that such franchise was as much a vested right of property as the ownership of the tangible property;* that the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the Navigation Company, is subject to the limitations imposed by the 5th Amendment, that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and that the assertion by Congress of its purpose to take the property does not destroy the state franchise." (Italics supplied.)

It is submitted that the test adopted by the courts in the above mentioned cases in determining the right of a claimant to recover is based on the question as to whether the right taken in condemnation is capable of valuation. If the claimant has been damaged by the taking of his interest with respect to real property and such damage is capable of valuation, he is entitled to share in the compensation. Where a claimant's interest is manifested by a contract for a lease, it seems clear that he is entitled to share in the award and it is immaterial whether such compensation is paid on the theory that every person having an estate or interest at law or in equity in the land taken is entitled to share in the award or on the theory that the taking of the leasehold by the Government resulted in the appropriation or frustration of the contract itself.

It seems clear that the agreement to lease in the instant case could have been specifically enforced on the well-recognized theory that the proposed lessee is to be regarded in equity as the holder of a lease under the terms set forth in the agreement. In code jurisdictions where the distinction between equitable and common law remedies has been abolished, it has been held that for all practical purposes

the proposed tenant actually holds under the contemplated lease. *Weed v. Lindsay,* 88 Ga. 686, 15 S.E. 836; *International Harvester Co. v. Shreveport Nu-Grape Bottling Co.,* 13 La. App. 222, 127 So. 47. During the term and so long as the Honolulu Plantation Company was not in default, the lessor would not be able to maintain an ejectment proceeding against the Company. Thus, the Honolulu Plantation Company possessed a continuing right to use the lands in question for the purpose of growing sugar cane just as though it had a formal lease on the premises.

While it is conceded that under the Fifth Amendment, the Government has virtually unlimited power to take property for public use, the owner thereof must be compensated for his interest in the lands taken.

The Court's attention is directed to the following excerpt from the case of *U. S. v. 9.94 Acres of Land, in City of Charleston,* 51 F. Supp. 478 (1943):

> "... After all, the intent of the Fifth Amendment to the Constitution is that while the government has power, with practically no limitation, to take property, nevertheless, the owner is to be treated fairly and his rights maintained. It is the duty of a court to attempt as nearly as possible to put the owner in as good a place as he was before the taking. In my opinion he is entitled to receive a definite fixed payment representing the value of his property at the time of the taking. If this taking be of a fee simple title the rules under which to ascertain the compensation are well fixed and known. See particularly United States v. Miller, supra. On the other hand, if the estate is anything less, then it is a question of fact for the jury to give due consideration to what, if anything, is left to the land owner, and when it has found a value of that it should be deducted from the full value of a fee simple title. This to me more nearly approaches a definition of just compensation and fair dealing with an owner than any other suggestions that have been made.

> "It may be suggested that the government should not be put to the jeopardy and risk of a finding which might be in part speculative because of the uncertainty of all the conditions surrounding the taking of the property. The same argument applies with equal force to the owner. And since it is the government which has determined to take the property and has determined the state in and manner of taking, if either party is to run the risk of a loss because of changes in the future, it would seem to be just that this be assumed by the party who is in control of and has determined the status of the case. . . ."

It appears to be well settled that valid contracts are property protected by the Fifth Amendment and that in the event they are appropriated by eminent domain proceedings, the owner is entitled to just compensation therefor. *Brooks-Scanlon Co. v. United States,* 265 U.S. 106, 68 L. Ed. 934 (1924).

Similarly, it would appear that the appropriation or frustration of contract rights incidental to the taking of other property may be compensable if the contract is related directly to the land taken. *A. W. Duckett & Co. v. United States*, 266 U.S. 149, 69 L. Ed. 216.

In conclusion, it is submitted to the Court that the modern concept of property rights as enunciated in the Brooklyn Terminal case, United States v. 53¼ Acres of Land, General Motors case, and others requires the payment of just compensation where contract rights are taken in an eminent domain proceeding. At the time of the takings in the present case, the Honolulu Plantation Company was in possession of the premises under at least a contract to lease. The Company was paying rentals in accordance with the terms of the agreement. It had made substantial expenditures on its plant as a whole, and on the Damon lands in particular, in reliance on the validity of the lease. The takings by the Government in this proceeding resulted in the appropriation and/or frustration of that contract to

lease. Under the authorities set forth above, the Honolulu Plantation Company as the owner of a contract right directly related to the lands taken is entitled to compensation therefor.

II.

THE DISTRICT COURT ERRED IN NOT FINDING THAT THE HONOLULU PLANTATION COMPANY WAS ENTITLED TO JUST COMPENSATION FOR SEVERANCE DAMAGES SUFFERED BY SAID COMPANY THROUGH THE TAKING OF ITS PROPERTY INTEREST IN 595.01 ACRES OF CANE LAND HELD BY IT UNDER THOSE CERTAIN AGREEMENTS EXECUTED BY AND BETWEEN THE TRUSTEES OF THE DAMON ESTATE AND SAID COMPANY.

III.

THE DISTRICT COURT ERRED IN NOT AWARDING THE HONOLULU PLANTATION COMPANY THE AMOUNT OF $595,010 AS JUST COMPENSATION FOR SEVERANCE DAMAGES SUFFERED BY SAID COMPANY THROUGH THE TAKING OF ITS PROPERTY INTEREST IN 595.01 ACRES OF CANE LAND HELD BY IT UNDER THOSE CERTAIN AGREEMENTS EXECUTED BY AND BETWEEN THE TRUSTEES OF THE DAMON ESTATE AND SAID COMPANY. (Statement of Points on which Cross-Appellant intends to rely on Cross-Appeal, Points (2) and (3) Record p. 517.)

The District Court in its decision awarded severance damages to the Honolulu Plantation Company upon the basis of $1,000 per acre for 440.175 acres, or a total of $440,175. The Court did not award severance damages in connection with the 595.01 acres of land held under the Damon title on the theory that the Company did not have an estate or interest in those lands which would entitle it to compensation in these proceedings. While cross-appellant's opening brief is concerned particularly with a discussion of the law and the evidence relative to the right of the Company to compensation for the 595.01 acres involved in the Damon title, it appears advisable to summarize briefly the basic theory on which cross-appellant's

entire case is founded even though the argument will also be presented in appellee's answer to appellant's opening brief.

One of the principal issues before the District Court and the only issue involved in the present appeal and cross-appeal is whether or not the Honolulu Plantation Company is entitled to severance damages because of the taking of certain of the lands in these proceedings. No evidence was introduced by the Government relative to severance damages, the latter taking the position that the Honolulu Plantation Company was not entitled to severance damages as a matter of law. Accordingly, under well established rules of law, the Appellate Court must regard the findings of the trial court with relation to severance damages if adequately supported by the evidence, as conclusive and binding.

In order to assist the Court to the fullest extent in resolving the question of severance damages, it is believed advisable to first present the law applicable to that phase of the case and then to discuss the evidence. The law clearly allows the severance damages in question if they are proved and the evidence adduced clearly shows that the Company was damaged.

It is clear that the property taken was mainly leasehold property and to a great extent the property remaining was leasehold property, though it should be pointed out that the sugar mill and the major part of the irrigation system and camps for employees which were located on fee lands owned by the Company suffered the greatest severance damages. The fact that the property taken was leasehold rather than fee has, of course, no bearing on the rights of the Honolulu Plantation Company insofar as severance damages are concerned.

> "The critical terms are 'property,' 'taken' and 'just compensation.' It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights

recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years,' as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess."[4]

The above excerpt from the General Motors case indicates that the Court is here concerned with the plantation's "relation to the physical thing, as the right to possess, use and dispose of it," that is, the plantation's interest "in the thing itself" and that is the "interest known as an 'estate or tenancy for years'."

The basic rule with respect to severance damages is well stated by the Circuit Court of Appeals, Third Circuit, in the Sharpe case[5] in the following language:

"It is not denied that in rendering the 'just compensation' secured by the constitution of the United States to the citizen whose property is taken for public uses it is right and proper to include the damages in the shape of deterioration in value which will result to the residue of the tract from the occupation of the part so taken. In applying this rule, however, regard is had to the integrity of the tract as a unitary holding by the owner. The holding from which a part is taken for public uses must be of such a character as that its

[4] United States v. General Motors Corporation, 323 U.S. 373, 89 L. Ed. 311 (1945).

[5] Sharpe v. United States, 112 F. 893, 896 (1902).

integrity as an individual tract shall have been destroyed by the taking. Depreciation in the value of the residue of such a tract may properly be considered as allowable damages in adjusting the compensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding, and the distinction between a residue of a tract whose integrity is destroyed by the taking and what are merely other parcels or holdings of the same owner, must be kept in mind in the practical application of the requirement to render just compensation for property taken for public uses. How it is applied must largely depend upon the facts of the particular case and the sound discretion of the court."

The evidence, as we shall hereafter point out to the Court, clearly shows that the properties remaining after the takings (excluding movable personal property) suffered a loss in value by reason of the takings. If so, how may such loss of value be proven?

". . . 'Upon considering the record and the argument we find that the land taken is a part of a larger tract which at the time of the taking was used as a unit for a brick manufacturing plant and that the severance of the part taken did destroy the usefulness and value of the plant, so that what remained had the value only of disorganized land and buildings, and the machinery comprised in the plant had only the value of such second-hand property. The owner is entitled to be compensated not only for the separate value of the land taken, but also for the loss in value of the remainder of the tract in the use that was made of it at the time of the taking.

" '*There being no established market price, the fair value at the date of the taking of the whole plant, excluding personal property, ought to be ascertained, looking upon it as a plant organized for a business shown to be generally successful and having a good prospect; and also the fair value for sale of what was left afterward.* The difference in the values is the just

compensation to be paid. That the plant was making money may be considered in fixing its value for sale, but the business is not to be valued as such, nor is any loss of future profits to be compensated. What the plant originally cost, what Stephenson Brick Company paid for it at judicial sale, it not having been a sheriff's sale, and what it would cost to reproduce the plant less a fair depreciation, may all be considered, but neither is to be taken as a fixed standard. The members of this court are not agreed on the value of all the items involved in the plant or in what is left of it, and we do not attempt to fix them separately. We do agree that the total compensation fixed by the three district judges is fair; and we find as our judgment of the value of the property condemned and as the just compensation due to be paid for the taking as of the date thereof, to-wit October 28, 1936, the sum of $97,500'." (Italics supplied.)

Stephenson Brick Co. v. U. S. et al. CCA 5th Circuit, 110 Fed. 2nd 360, 361.
Decided March 15, 1940.

In *Baetjer v. United States,* 143 F. 2nd 391, the Court says:

"With these general considerations in mind we turn to the evidence on damages introduced by the appellants at the trial below, but stricken at the end of their evidence in chief. This evidence was to the effect that in the past the appellants had raised sugar cane on the lands on Vieques which the government has taken; that they had transported this cane to their mills on the main island of Puerto Rico for processing into sugar; and that, there being no other lands economically available upon which they could raise cane to keep their mills running at full capacity, they had suffered a loss to the extent of $270,000 'in value of excess equipment.' The meaning of the phrase just quoted is not altogether clear. *If it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by the appellants as efficiently and therefore as profitably as before the taking, then the stricken evidence shows*

only a loss to business which resulted as an unintended incident of the taking and so a loss not compensable under the doctrine of Mitchell v. United States, supra. On the other hand, if it means, and there is other evidence tending to show that this is what the witness who used the phrase meant by it, that the over-capacity of the mills with respect to cane lands available to supply them has depreciated their value on the market to the extent of $270,000, then the evidence would tend to show a compensable loss. In short the stricken evidence would indicate a compensable loss only if it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking, this being a matter which a hypothetical willing buyer would consider in determining what he would pay for the property. The case must be remanded for the court below to consider the appellants' evidence, and the evidence which the government says it can introduce to contradict it, in order to determine whether or not the appellants have suffered a compensable loss, and, if they have, its extent." (Italics supplied.)

In Nichols on Eminent Domain, Vol. 2 Second Ed. Par. 236, P. 721, the author says:

> "It is well settled that, where part of a tract of land is taken for the public use, the just compensation to which the owner is entitled by the constitution includes the damages to the remainder of the tract resulting from the taking as well as the value of the land taken. In other words, the 'just compensation' guaranteed by the constitution implies not merely the value of so much land separately from its connection with the whole tract, but the injury or loss to the whole estate caused by the taking from it the part which is so appropriated."

In the case of *Illinois Railway Company v. Humiston,* 208 Ill. 100 (69 N.E. 880), it appeared that a railroad condemned a strip of land for a right of way through a farm. There were buildings on a part of the farm, but the opinion

indicates that the strip taken was vacant land. The lower court instructed the jury to value the strip "as a part of the whole farm" and excluded evidence offered by the taker concerning the value of the farm without improvements. The taker on appeal alleged that the exclusion of the evidence was error, on the ground that the value of the part was merely its value as "a part of the farm without improvements."

The upper court in affirming the lower court said:

> "Where the vacant land embraced in the farm was necessarily used and occupied in conjunction with the improvements thereon, and, by reason of so being used and occupied, had a value as an entirety over and above the value of the bare land, the owner of the land would have the right to the value of the part, sought to be taken, as used and occupied in connection with the whole farm. In other words, the strip of land sought to be taken for a right of way has a special value to the owner in connection with the whole of the farm with the improvements upon it, which is greater than the mere value of the bare land without the improvements."

The case of *Lineburg v. Sandven* (N.D.) 21 N.W. 2nd 808 is very much in point. This was an eminent domain proceeding arising out of the condemnation of lands for use as a public highway. The controversy here resulted from the taking of 21.88 acres of a farm containing 286.57 acres of land.

The District Court found the compensation to which the owner of the land was entitled was as follows:

Value of the 21.88 acres taken	$ 590.76
Value of the fence	187.50
Damages to the remaining farm as a unit	2,443.59
Total Compensation	$3,221.85

On appeal, the upper court sustained the findings made by the lower court except for the correction of an error made in the computation of the damages.

The principle stated by the lower court and accepted by the Supreme Court of North Dakota is well stated as follows:

> " '. . . The compensation to which appellant is entitled is the difference between the actual market value of appellant's property considered as a whole at the date of the trial before the severance of the property condemned and the actual market value of the remainder of the property after the appropriation of that part condemned.' "

In answer to the contention of the appellant's counsel that in arriving at the value of the farm before the taking, only the value of the land should have been considered and that no consideration should have been given to the buildings thereon, the Court said that this contention could not be sustained and quoted as follows from Lewis on eminent domain:

> " '. . . Ordinarily buildings are part of the land and when land is taken for public use the buildings and structures thereon are taken with it and the whole must be paid for.' "

The Court said further:

> ". . . The farm was established and had been maintained and operated as a single unit. The buildings are undeniably a part of the realty. The owner of the farm is entitled to be paid the value of the parcel of property which is taken and he is entitled to be paid the damages to the remainder of the farm that was not taken which result from the taking of the parcel and the construction thereon of the proposed highway. The parcel so remaining consists not only of the land but of the buildings thereon which are a part of the realty."

Certainly in valuing the property of any enterprise the question of whether or not the combined properties produce a fair return on the capital invested is important. In other words, properties of a successful going concern when

considered as a whole are almost certain to have a greater value than the same properties of a concern which has been unsuccessful and must be liquidated.

A prospective purchaser considering the purchase of properties like those of the Honolulu Plantation Company would look into the history of the concern and the use made of its properties. He would consider whether the enterprise was successful or not as well as the future prospects of the enterprise.

As stated in the Stephenson Brick Company case, supra,

> "There being no established market price, the fair value at the date of the taking of the whole plant, excluding personal property, ought to be ascertained, looking upon it as a plant organized for a business *shown to be generally successful and having a good prospect;* and also the fair value for sale of what was left afterward." (Italics supplied.)
>
> (110 Fed. 2nd 360,361.)

The evidence adduced by the Honolulu Plantation Company, on the trial of these consolidated cases, shows beyond any reasonable doubt that the Company sustained a compensable loss and is entitled to severance damages as a result of the takings.

It is the contention of cross-appellant herein that after the takings, the Plantation's mill, irrigation system and the plantation equipment in general had an uneconomic over-capacity with respect to the cane lands available to supply the enterprise, such that the Plantation could not be operated by anyone as efficiently as before the takings and that such over-capacity depreciated the value of the mill, the irrigation system and the other equipment and properties remaining after the takings. The market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conductd by said Company was far higher than the market value or the fair value of the real property of said integrated

unit remaining after the takings. The difference between those values is the amount the Company suffered in damages by reason of the severance.

It is submitted that the testimony given by several witnesses shows that an uneconomic over-capacity would depreciate the value of the remaining plantation properties as a unitary whole.

The testimony in this regard given by Mr. George L. Schmutz (R. p. 669 et seq.) may be considered first. The outstanding qualifications of Mr. Schmutz, from the standpoint of both training and experience, as an engineer, real estate broker, appraiser and as author and lecturer on appraisal work, considered together with his intimate knowledge of the properties taken in these proceedings, suggest that his opinions of value are entitled to great weight.

Mr. Schmutz valued all of the properties of the Honolulu Plantation Company prior to the takings, excluding movable personal properties and excluding growing crops, at $4,200,000 (R. p. 686) and he valued the same properties with the same exclusions after the takings involved in these proceedings as of June 21, 1944, at $3,113,000 (R. p. 687).

Mr. Schmutz said specifically that in his computations he did not ascribe any value to profits or good will of a going concern. Mr. Schmutz indicated that his opinion of value computed before and after the takings was based on a unit property value of $1,000 per acre for irrigated cane land of a leasehold plantation (R. p. 687) and that he considered the total irrigated cane land area controlled by the Honolulu Plantation Company before the takings at 4,283 acres and that after the takings involved in these proceedings he considered the irrigated cane land controlled by the company at 3,196 acres. (R. p. 687.)

The witness testified that in arriving at a unit property value of $1,000 per acre he considered several matters. Among other factors, he said that in discussing the matter of value with people in the community regarding the invest-

ment in irrigated cane lands per acre, he found that the common opinion in the community was that leasehold plantations without a refinery required the investment of about $1,000 per acre in irrigated cane lands and the properties serving them (R. p. 688). The witness testified further that he had made a study showing the amount of depreciation and the value of the property from 1939 to the present for the purpose of determining the shrinkage in value occasioned by the taking of considerably more acres than are involved in the present proceedings to get some indication of the amount of depreciation on the average suffered by the loss of each acre (R. p. 688). Mr. Schmutz indicated also that he had made a study of a report prepared by a qualified technician in Honolulu concerning the damage caused by prior takings for the purpose of understanding his views, his method of approach and his conclusion. The witness said that as a result of these studies and investigations, he arrived at a conclusion that the value of the physical property depreciated at the rate of about $1,000 per acre for each acre that was lost by virtue of the takings. (R. p. 688.)

Mr. Schmutz testified further that on the basis of the published annual reports of the company, the output of the mill was approximately 20,000 tons prior to the takings and about 15,000 tons after the takings. (R. p. 689.) It was his opinion that the decrease in the output of the mill would depreciate the value of the mill property not only because of the resulting over-capacity but also because of the further fact there would be an increase in production cost so that the mill could not be operated as efficiently and, therefore, as profitably as before the taking. (R. p. 689.)

The witness indicated that in arriving at his opinion of value he considered the fact that there was no land available for replacement of cane growing areas lost to the Government in these proceedings. He said that if there had

been land available for replacement, the damage would have been less. (R. p. 690.) He testified that he also considered the fact that in 1936 the Company renewed or extended most of its major leases to the year 1965. (R. p. 678.)

It was further pointed out that if there had been a free market for raw sugar and if the same could be purchased in the market in the future to take the place of plantation grown cane, the damage would have been less. (R. p. 691.)

Mr. Charles Campbell Crozier, Deputy Tax Commissioner of the Territory, testified as an expert witness for the Company. (R. p. 835 et seq.)

Mr. Crozier indicated that in his capacity as a tax official and as an appraiser for the Government in a number of its takings, he had studied the Honolulu Plantation Company to a considerable extent. (R. p. 852.)

Mr. Crozier was asked to assume that on June 21, 1944, the Honolulu Plantation Company had approximately 4,400 acres of cane land and that on that date 1,087.590 acres of cane land were taken from it, and to express his opinion as to the fair value of all of the properties of the plantation before and after the takings, excluding movable personalty and growing crops, taking into consideration his knowledge of the plantation, its holdings and the manner in which it was held. (R. p. 870.) The witness said that in his opinion there would be a diminishing value before and after the takings of approximately 20% or about a million dollars. (R. p. 871.)

The witness based his opinion of value on the theory that a plantation of 4,400 acres was an enterprise of certain characteristics and that as the lands comprising the 1,087 acres were taken, there was a diminishing value. The witness said that as of June 21, 1944, a plantation of 4,400 acres would possess a certain value, which the witness set at about $4,000,000. He testified that as of June 22, the day after the takings, by use of the so-called "thousand-dollars-

an-acre rule," the value of the plantation would be about $3,000,000. (R. p. 873.)

Witness explained the "thousand-dollars-an-acre rule" as one of the methods developed to estimate the capital or investment required for a 25 or 30 thousand ton leasehold plantation to operate and produce sugar. (R. p. 873.)

The testimony of Mr. S. L. Austin (R. p. 526 et seq.) and Mr. Spalding (R. p. 1040 et seq.), testifying as officers of the Honolulu Plantation Company, substantiates to a very large degree the testimony given by Mr. Schmutz and Mr. Crozier.

Mr. S. L. Austin's opinion of the value of the plantation, excluding movable personalty and growing crops before the takings involved in these proceedings, was $4,300,000 and his opinion of the value of the plantation excluding the same items after the takings was $3,300,000. (R. p. 582, 583.)

Mr. Schmutz, Mr. S. L. Austin and Mr. Crozier all testified that prior to the takings, the output of the mill was in excess of 20,000 tons and that the output of the mill after the takings was and could only be about 15,000 tons. All three witnesses expressed the opinion that the decrease in the output of the mill would depreciate the value of the mill property because of the resulting uneconomic overcapacity.

All three of the witnesses testified that in arriving at their opinions of value they considered the fact that there was no suitable land available for the replacement of cane growing area lost to the Government. All three of the witnesses testified that in their judgment the value of the remaining physical property depreciated at the rate of about $1,000 per acre for each acre of cane land which was lost as a result of the takings. All three of the witnesses testified that they did not ascribe any value to potential profits or the good will of a going concern.

It is respectfully submitted that the factors considered by the Company's witnesses were properly considered and that the testimony shows conclusively that after the takings involved in these proceedings the Company's mill, irrigation system and other nonmovable physical properties had an uneconomic over-capacity so that they could not be operated by the Company or by anyone else as efficiently and as profitably as before the taking.

Witnesses for the Company considered and they had a right to consider that the plantation was organized to conduct a business which had been generally successful and which possessed a good prospect. The factors considered by the witnesses in arriving at the value of the plantation before and after the takings, such as the dividends record of the Company, the renewal or extension in 1936 of most of its major leases, the amount of money spent by the Company in capital improvements and betterments, the book value of the Company, the earnings of the property during the years prior to the takings were proper elements to be considered. It is admitted that the witnesses for the Company did not attempt to fix separately the value of all or any of the items considered in arriving at their opinions. However, they did reach substantial agreement on the difference in value of the plantation before and after the takings. Mr. Schmutz' opinion of the value before the taking was $4,400,000 and his opinion of value after the taking was $3,113,000 or a difference of $1,287,000. (R. p. 686, 687.) Mr. Austin's opinion of value before the taking was $4,300,000 and his opinion of value after the taking was $3,300,000 or a difference of $1,000,000. (R. p. 584.) Mr. Crozier's opinions were substantially the same as Mr. Austin's.

The opinions of the Company's witnesses as to the value of the plantation's properties before and after the takings indicate that the value of the property remaining after the takings decreased in value at the rate of $1,000 an acre for

each acre of cane land taken. The trial court made a finding to that effect in the following language: "... I am satisfied by the evidence that the Company has proven its claim that its remaining property decreased in value at the rate of $1,000 an acre for each cane acre taken." (R. p. 491.)

As has been pointed out above, the trial court awarded damages upon the basis of $1,000 per acre for 440.175 acres, or a total of $440,175. The court did not award severance damages in connection with the 595.01 acres of lands held under the Damon title on the theory that the Company did not have an estate or interest in those lands which would entitle it to compensation in these proceedings.

In view of the fact that the Government did not present any evidence on the issue of severance damages, the testimony of the Company's witnesses that the value of the remaining physical property depreciated at the rate of $1,000 per acre for each acre of cane land taken in these proceeding should be accepted by this court as indicating the proper measure of severance damages in this proceeding.

CONCLUSION

Accordingly, it is submitted to the court that the Honolulu Plantation Company by virtue of its estate and interest in the Damon lands is entitled on this cross-appeal to judgment in the amount of $595,010, in addition to the amount of $494,748.00 awarded by the lower court.

Dated at Honolulu, T. H., this 12th day of March, 1949.

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